89-62

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in the Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK JOSEPH TURK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER, IN DETERMINING A DEFENDANT'S APPEAL FROM A DISTRICT COURT'S DENIAL OF HIS MOTION FOR MISTRIAL BASED ON THE ERRONEOUS ADMISSION OF OTHER ACTS TESTIMONY, THE GOVERNMENT BEARS THE BURDEN OF PROVING THAT ANY ERROR WAS HARMLESS BEYOND REASONABLE DOUBT?

II. WHETHER, IN DETERMINING A DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE GOVERNMENT'S INTRODUCTION OF UNFAIRLY PREJUDICIAL, INADMISSIBLE, OTHER ACTS TESTIMONY, THE DISTRICT COURT MUST ALLOW THE DEFENDANT TO INQUIRE ABOUT THE CIRCUMSTANCES UNDER WHICH THE TESTIMONY WAS GIVEN AND CONSIDER WHETHER THE GOVERNMENT INTENTIONALLY ELICITED IT?

III. WHETHER A SINGLE, SHORT, MILDLY WORDED CURATIVE INSTRUCTION CAN REMEDY THE UNFAIR PREJUDICE RESULTING FROM THE JURY'S ERRONEOUS CONSIDERATION OF REPEATED TESTIMONY CONCERNING A DEFENDANT'S UTTERLY IRRELEVANT, TEMPORALLY REMOTE INCARCERATION?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. It is reproduced in the Appendix (hereinafter "A") at page 1.

JURISDICTION

The judgment to be reviewed was entered on March 31, 1989. A-1. Mr. Turk's Suggestion of Rehearing In Banc was denied on May 4, 1989. A-2. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND FEDERAL RULE OF PROCEDURE INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Federal Rule of Evidence 404(b):

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be

> admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Title 28, United States Code section 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

A. Trial Proceedings

Mr. Turk was indicted in the Middle District of Florida, Tampa Division, for conspiring to possess with intent to distribute, and possessing with intent to distribute, cocaine. He moved to prohibit the government from mentioning in opening statement or eliciting testimony from any witness that he had been incarcerated with the goverment's main witness and informant, Check Shem Fong, ten years before. The court granted the motion and placed the burden on the government to justify

admission of any such evidence. A-4-5.

Within the opening minutes of its first witness's testimony, the government elicited the forbidden testimony. The prosecutor elicited from Fong that Fong was arrested for heroin charges in 1976 and served his sentence at Eglin Air Force Base. Mr. Turk's objection to the question, "[W]here did you serve your time?" was overruled. The prosecutor next elicited that Fong had known Mr. Turk since 1977. Fong testified that at their first meeting in 1983 after Fong had become a government informant, he and Mr. Turk "talked about a lot of old things and the old buddies from Eglin Air Force Base." (Mr. Turk's short stint at Eglin was not narcotics related.) The court, again, overruled Mr. Turk's objection. Completing the prejudical chain of inference, Fong testified that he asked Mr. Turk at their 1983 meeting if Mr. Turk could provide him a cocaine connection because supposedly some "old buddy" had come

to see Mr. Turk to do business before. Again, the court overruled Mr. Turk's objection.

The government elicited more of the inadmissible testimony from its next witness, DEA Agent James Cloonan:

> Q. Now, directing your attention, sir, to February 8th, 1987, are you aware of whether or not Mr. Fong had a telephone conversation on that day with an individual indentified as Frederick Turk?
>
> A. Yes, sir, I am.
>
> * * * *
>
> Q. Prior to February 8th, sir, of 1987, had Mr. Fong mentioned Mr. Turk's name to you?
>
> A. Yes, he had.
>
> Q. Had he mentioned Mr. -- in what sense did he mention Mr. Turk's name to you?
>
> MR. ROSS (counsel for Mr. Turk): I object. That is an answer based on hearsay.
>
> THE COURT: No, sir, Overruled.
>
> A. He stated that he knew Mr. Turk from when they were in prison and that when --

MR. ROSS: I object, Your Honor. I'd like to go side-bar.

THE COURT: And I will sustain the objection and disregard that question and that answer, ladies and gentlemen. Give no consideration to it at all.

MR. ROSS: I would like to go to side-bar, Your Honor.

THE COURT: All right. At a later time. You may proceed.

At subsequent side-bars Mr. Turk moved for a mistrial based on Cloonan's testimony and Fong's testimony, for which Mr. Turk's objections were overruled, that strongly, but erroneously, implied Mr. Turk had been incarcerated for a drug-related offense. A-7-19. The court denied these motions. A-10,11,17,19. The court refused to do anything further to "cure" the improper testimony. A-20-22. It also refused Mr. Turk's request to inquire how, given the court's instruction that the prosecutor admonish his witnesses to avoid this sensitive area, the government's witnesses

could have provided the inadmissible testimony. A-21-22.

Mr. Turk moved for judgments of acquittal and renewed his motions for mistrial following the government's case and at the close of all the evidence. The court denied these motions. At Mr. Turk's request, the district court instructed the jury on entrapment.

The jury found Mr. Turk guilty on both counts. The district court denied Mr. Turk's motion for new trial, entered its judgment of conviction, and sentenced Mr. Turk to concurrent prison terms of twelve years.

Mr. Turk timely appealed his judgment of conviction and sentence. The district court found that his appeal raised "a substantial question of law or fact likely to result in reversal" and released Mr. Turk on bond. On March 31, 1989, the United States Court of Appeals for the Eleventh

Circuit affirmed Mr. Turk's conviction without opinion. A-1. On May 4, 1989, the court denied Mr. Turk's Suggestion of Rehearing In Banc. A-2-3.

B. Facts

The trial evidence established that beginning prior to February of 1987, Check Shem Fong began calling Mr. Turk at his home in Miami to induce him to find a cocaine connection. Fong, a twice-convicted heroin trafficker, was operating as a DEA agent, fulfilling his plea agreement to develop narcotics connections for federal prosecutions. He had not seen Mr. Turk for at least three years. Despite Fong's numerous calls and messages, Mr. Turk did not return these calls.

On February 8, 1987, Fong finally spoke to Mr. Turk. Fong complained to Mr. Turk that business was "bad, really bad" and asked Mr. Turk to find him a cocaine

connection. Fong told Mr. Turk business was bad to solicit Mr. Turk's sympathy and induce Mr. Turk to help him. Mr. Turk acquiesced to a visit Fong proposed in the next two months.

Between February 8 and April 26, 1987, Fong called and left messages for Mr. Turk three or four times. Mr. Turk did not call back. On April 26th Fong apppeared at a workshop where Mr. Turk had relocated himself in Bartow, Florida. Fong admitted that Mr. Turk was surprised to see him. Fong continued to stress his desperation and dire financial straits. He stated he had to sell his home to find a new business. Fong asked that Mr. Turk help him obtain five kilograms of cocaine to bail himself out of his financial problems. Mr. Turk rebuffed this request and suggested that Fong ask a mutual acquaintance in Bimini.

By May 11th the DEA had decided to pursue Mr. Turk and attempt to tie him into a cocaine deal. (In fact, the DEA was using

Mr. Turk to get to an acquaintance, Mr. Cook, who they had targeted as a suspected narcotics trafficker.) Mr. Turk had made no attempt to recontact Fong. On that date, Fong called three separate places attempting to locate Mr. Turk. His messages ranged from "I hope you call me soon" to "its very important; tell him to call me tonight." Mr. Turk did not return these calls.

On May 17th Mr. Turk finally returned Fong's calls. Although Mr. Turk stated he could obtain cocaine, no arrangements for a transaction were made. On May 19th Fong told Mr. Turk he wanted ten kilograms and that he wanted them delivered in New York. Mr. Turk stated that the cocaine could not be delivered in New York. He also stated that he didn't like to get in the middle of drug deals but for Fong, he would do it "just once." Again, no transaction was arranged.

Fong attempted to contact Mr. Turk several times between May 19 and June 1,

1987. Mr. Turk had received Fong's messages but did not attempt to contact him. On June 1st Fong appeared at Mr. Turk's workshop "ready" to do business. The next three days involved several discussions and meetings between Fong and Mr. Turk concerning where and how to conduct the transaction. Finally, on June 4, 1987, Mr. Turk was arrested as he prepared to give Fong a kilogram of cocaine.

The federal agents obtained a warrant and searched the property near Bartow where Mr. Turk was staying. A narcotics trained dog assisted. No drugs, drug records, or paraphernalia were found in Mr. Turk's mobile home. The dog search revealed there had been no detectible amount of cocaine or any other narcotic present in the mobile home in the recent past.

Mr. Turk raised his entrapment defense primarily through his cross-examination of government witnesses. His evidence revealed that between February of 1987 and the time of his arrest he had

been working seven days per week, up to fourteen hours per day, designing and building a charter boat which he intended to operate in Miami. People close to Mr. Turk had never heard of Fong until he began calling Mr. Turk in Florida and appeared in 1987.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

The Eleventh Circuit Court of Appeals' per curiam decision in Turk, though brief in length, is pregnant with error. Behind it hides a trial repeatedly tainted by the erroneous admission of bad acts evidence of Mr. Turk's wholly unrelated, ten year old incarceration. The decision masks an utter failure to correctly apply the harmless-error rule. Review by this Court is necessary to reconcile the clear conflict between the Turk

decision and opinions of this Court and other federal courts of appeals. Review is essential to remedy the manifest miscarriage of justice created by the decision below.

One of the most hotly litigated criminal law issues in the federal courts today concerns the admissiblity of "other acts" evidence. See, e.g., United States v. Manganellis, 864 F.2d 528 (7th Cir. 1988); United States v. Temple, 862 F.2d 821 (10th Cir. 1988); United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988); United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988); Thompson v. United States, 546 A.2d 414 (D.C.App. 1988). This Court has recently addressed a limited aspect of this issue. See Huddleston v. United States, 485 U.S. 681 (1988). It long ago recognized the devastating nature of improper character evidence. E.g., Michelson v. United States, 335 U.S. 469, 475-76 (1948).

The rule prohibiting introduction of evidence of criminal propensity is of ancient

origin and fundamental to our system of criminal justice. As the New York Court of Appeals observed in People v. Molineaux, 168 N.Y. 264, 61 N.E. 286 (1901):

> This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Carta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.

Id. at 291, 61 N.E. at 293. Because the "propensity rule" is indispensable to the presumption of innocence, Molineaux; United States v. Foskey, 204 U.S. App.D.C. 245, 251, 636 F.2d 517, 523 (1980); Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976), it has definite, constitutional overtones. Thompson v. United States, 546 A.2d 414, 419 (D.C.App.

1988)(citing E. Cleary, McCormick on Evidence, § 190, at 557 n.1 (1984 ed.)).

Analysis of the Eleventh Circuit Court of Appeal's decision in Turk must begin with recognition that the government's evidence of Mr. Turk's prior incarceration (and precedent criminal conduct), elicited circumstantially from informant Fong and directly from agent Cloonan, was improper propensity evidence, inadmissible under Federal Rule of Evidence 404(b). The district court, once, sustained Mr. Turk's objection to it. Several appellate courts have reversed convictions based on the erroneous admission of virtually identical evidence. United States v. Pavon, 561 F.2d 799 (9th Cir. 1977); United States v. Warf, 529 F.2d 1170 (5th Cir. 1976); United States v. Ratner, 464 F.2d 169 (5th Cir. 1972); Odom v. United States, 377 F.2d 853 (5th Cir. 1967). Mr. Turk's reliance on an entrapment defense did not render the evidence admissible. See United States v. Bramble,

641 F.2d 681, 682-83 (9th Cir. 1981), cert. denied, 459 U.S. 1072 (1982) (evidence of possession of marijuana conviction inadmissible to prove predisposition to distribute cocaine); United States v. Daniels, 572 F.2d 535, 538 (5th Cir. 1978) (evidence of firearms conviction inadmissible to prove predisposition to distribute heroin). Thus, the court's failure to reverse Mr. Turk's conviction turned unquestionably on its harmless-error analysis.

Title 28, United States Code section 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." See Fed.R.Crim.P. 52(a). If an error is of constitutional dimension, this Court held in Chapman v. California, 386 U.S. 18 (1967), that the prosecution must prove beyond reasonable

doubt that the error did not contribute to the verdict. Id. at 22-24. For nonconstitutional error, this Court held in Kotteakos v. United States, 328 U.S. 750 (1946):

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand . . . . But if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Id. at 764-65. [1] See United States v. Lane, 474 U.S. 438, ___ (1986). The burden of proving nonconstitutional harmless-error has been placed both on the prosecution, see

[1]The formulation of the harmless-error rules in Chapman and Kotteakos appear to be coextensive. United States v. Hasting, 461 U.S. 499, 509 n.7 (1983).

United States v. Wilson, 809 F.2d 75, 81 (1st Cir. 1986), cert. denied, 107 S.Ct. 2484 (1987), and the defendant. United States v. Murray, 751 F.2d 1528, 1533 (9th Cir.), cert. denied, 474 U.S. 979 (1985). Cf. United States v. Shackleford, 738 F.2d 776, 783-84 (7th Cir. 1984) (except in unusual circumstances, bad acts evidence almost always suggestive of propensity, impugns defendant's character, and plays a substantial role in swaying the jury).

In applying the harmless-error analysis, this Court has prescribed a factorial approach. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). In the context of the erroneous admission of "other acts" evidence, the federal appellate courts have identified several factors relevant to determining whether the error was reversible including whether the quantum of properly admitted evidence is overwhelming, e.g., United States v. Hernandez, 750 F.2d 1256, 1258 n.9 (5th Cir. 1985), whether the

inadmissible evidence was repeated to the jury, see, e.g, Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. 1981), and whether the district court gave any (or gave adequate) curative instructions. See United States v. Harvey, 845 F.2d 760, 763 (8th Cir. 1988); United States v. Lamberty, 778 F.2d 59, 61-62 (1st Cir. 1985); United States v. Phillips, 599 F.2d 134, 137 (6th Cir. 1979). See also E. Imwinkelried, Uncharged Misconduct Evidence, § 9:74 at 125-27 (1984 ed.). Thus, for instance, where the evidence against a defendant is not overwhelming and the "other acts" evidence bears substantially on a key issue before the jury, reversal is necessary. See United States v. Hodges, 770 F.2d 1475, 1480-81 (9th Cir. 1985). Where the inadmissible evidence is repeated or otherwise emphasized in argument, reversal is mandated. See Hernandez. Likewise, where a district court only gives a weak or equivocal curative instruction, reversal is required. See

Lamberty, 778 F.2d at 61-62.

Although the Eleventh Circuit Court of Appeals affirmed Mr. Turk's conviction without opinion, it's decision irreconcilably conflicts with this Court's decisions in Chapman and Kotteakos and the decisions of other federal courts applying the harmless-error rule. While the evidence against Mr. Turk was strong, he was entitled to an acquittal if the government failed to prove beyond reasonable doubt that he was not entrapped. The evidence at trial, including the fact that this was a "sting" operation, the government's reliance on moral inducement, Mr. Turk's strong resistance, and the affirmative evidence negating predisposition established a strong entrapment defense. The government's inadmissible, "other acts" evidence undermined the very core of Mr. Turk's defense. The district court's single cautionary instruction was short and mild and

could hardly have cured its compound error.[2] Additionally, the improper evidence was repeated several times.

Given these circumstances, it is inconceivable that the error did not influence the jury or had but very slight effect. See Kottaekos v. United States, 328 U.S. 750, 764-65 (1946). Stated differently, one cannot reasonably say with fair assurance that the judgment was not substantially swayed by the error. Id. Review by this

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[2]Although this Court generally subscribes to the presumption that juries do as they are told, e.g., Green v. Miller, 483 U.S. 756, ___ n.8 (1987), this Court and various federal circuit and district courts have also registered grave reservations about the efficacy of curative instructions. E.g., Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial affects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (Jackson, J., concurring); Dunn v. United States, 307 F.2d 883 886 (5th Cir. 1962) ("one cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it."); Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) ("a drop of ink cannot be removed from a glass of milk.").

Court is necessary to correct the Eleventh Circuit's erroneous application of the harmless-error rule and to give further guidance to the other federal, circuit and district courts.

Notwithstanding this Court's pronouncements concerning the need for harmless-error analysis on appeal, it has indicated that the existence of prosecutorial misconduct is a relevant consideration in determining whether reversal of a conviction is necessary. In Namet v. United States, 373 U.S. 179 (1963), this Court considered whether the prosecutor's conduct in asking two defense witnesses questions in response to which the prosecutor knew the witnesses would invoke their privilege against compelled self-incrimination, required reversal. Notwithstanding the absence of defense objection, this Court observed that reversal might be required on either of two distinct grounds. First, reversal may be necessary due to prosecutorial misconduct

where the government makes a "conscious and flagrant attempt" to build its case out of improper inferences. Id. at 186. Second, reversal may be necessary if the error unfairly prejudices the defendant. Id. at 187. See United States v. Young, 470 U.S. 1, 35-38 (1985)(Stevens, J., dissenting).

This Court considered the role of prosecutorial misconduct in determining the necessity of reversal again in United States v. Hasting, 461 U.S. 499 (1983). There, this Court held that it was improper for a federal appellate court to invoke its supervisory power to reverse a conviction for the sole purpose of detering prosecutorial misconduct without regard to the harmless-error rule. Although this Court disapproved of the court of appeals' failure to apply the harmless-error doctrine, it indicated that prosecutorial misconduct is one factor to be balanced in the equation: "[The court of appeals'] analysis failed to strike the balance between disciplining the prosecutor

on the one hand, and the interest in the prompt administration of justice and the interest of the victims on the other." Id. at 509 (footnote omitted).

Several of the federal appellate courts have recognized the significance of prosecutorial misconduct in determining whether a trial court error requires reversal. For instance, in United States v. Cresta, 825 F.2d 538 (1st Cir. 1987), the court determined that the government's introduction of testimony that one of its witnesses met the defendants in prison was error. Id. at 549. Upon the defendants' objection, the district court made inquiry and specifically found that there had been no deliberate introduction of prior bad acts. Id. The court further gave an explicit curative instruction which it repeated twice that day. Under these circumstances, the appellate court concluded the error did not require reversal.

In United States v. Sardelli, 813

F.2d 654 (5th Cir. 1987), the court reversed the defendant's conviction based on the improper admission of other acts evidence noting: "The prosecutor's offer of the entire indictment was simply a device to get improper evidence before the jury." Id. at 657. In United States v. Dunn, 805 F.2d 1275 (6th Cir. 1986), the court reversed the defendant's conviction based on improper introduction of Rule 404(b) evidence. In doing so, the court observed that "it is plain from the record that the government used the evidence for a reason explicitly proscribed by Fed.R.Evid. 404(a) and 404(b) . . . ." Id. at 1283. In United States v. Davenport, 753 F.2d 1460 (9th Cir. 1985), the court reversed the defendant's conviction based on a question the prosecutor asked of a defense witness that improperly insinuated uncharged, bad acts of the defendant. The court held that to avoid a mistrial, the prosecutor's "good faith must be established to the satisfaction of the court, outside the

presence of the jury . . . ." Id. at 1463-64. The Eleventh Circuit Court of Appeals, too, has stated that prosecutorial misconduct may constitute a ground for reversal if it prejudices substantial rights of the defendant. United States v. Johns, 734 F.2d 657 (11th Cir. 1984). Cf. United States v. Dinitz, 424 U.S. 600 (1976) (consideration of prosecutorial misconduct necessary to determine whether trial error resulting in reversal bars retrial under double jeopardy clause); United States v. Sgro, 816 F.2d 30,33 (1st Cir. 1987) (deterrence of prosecutorial misconduct factor considered in determining whether to reverse conviction).

In the instant case, the district court flatly denied Mr. Turk's request to inquire of the prosecutor how, given that he was supposed to have instructed his witnesses not to testify about Mr. Turk's prior incarceration, witnesses Fong and Cloonan could have given this unfairly prejudicial

testimony. A-21-22. The court of appeals, by its affirmance, condoned this ruling. Without this inquiry, the district court was unable to fairly evaluate whether the improper testimony was inadvertent or the product of prosecutorial misconduct. While it appears from this Court's decisions that any prosecutorial misconduct could not, alone, have required reversal of Mr. Turk's conviction, the federal appellate decisions cited supra certainly indicate that the existence vel non of prosecutorial misconduct should have been considered in determining whether the trial error required reversal. Review by this Court is necessary to resolve the conflict between the decision below and the federal decisions cited supra and to clarify the law concerning this important issue.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The decision of the Eleventh Circuit Court of Appeals below utterly failed to do justice in this case. The appeal presented the issue of whether the government's repeated introduction of evidence concerning Mr. Turk's wholly irrelevant, ten-year old incarceration, constituted reversible error. The district court registered its belief concerning the issue by sustaining Mr. Turk's objection to the most offensive testimony and by taking the unusual (but fully warranted) step of granting Mr. Turk an appellate bond.

The circumstances surrounding the error at trial presented as strong a case as any for reversal. Objections to much of the inadmissible testimony were overruled. The evidence of Mr. Turk's bad character was placed repeatedly before the jury. The

district court's single, mildly-worded curative instruction was incapable of remedying the taint of the improper evidence. Finally, the facts presented at trial strongly supported Mr. Turk's entrapment defense.

Inexplicably, the court of appeals' decision failed to condemn the government's elicitation of the improper and unfairly prejudicial testimony. It wholly ignored three binding precedents that appeared to compel reversal. See United States v. Warf, 529 F.2d 1170 (5th Cir. 1976); United States v. Ratner, 464 F.2d 169 (5th Cir. 1972); Odom v. United States, 377 F.2d 853 (5th Cir. 1967). The court's decision makes clear that it failed to correctly apply the harmless-error rule.

In United States v. Sokolow, _____ U.S. ___ (1989), Justice Marshall reiterated his grave concern over the willingness of courts to give "short shrift to constitutional rights" "when drug crimes or

anti-drug policies are at issue." Id. at ___ (Marshall, J., dissenting). He reminded the lower courts that they must be ever-conscious that their rulings apply to the innocent and the guilty alike. Id. at ____. Disregarding these warnings, it appears that the court below succumbed to the mounting social pressure to eliminate this country's staggering drug problem at all costs.

Although Mr. Turk was not entitled to a perfect trial, he was certainly entitled to a fair one. His right to have his well-founded entrapment defense fairly considered by the jury was no less substantial than the right of a defendant who claims he had no involvement with the drugs at all. He was denied that right in the district court. The Eleventh Circuit Court of Appeals failed to uphold the right on appeal. To correct this departure from the accepted and usual course of judicial proceedings and to remedy this manifest miscarriage of justice, this Court should

review this case and reverse the judgment of the Eleventh Circuit Court of Appeals below.

CONCLUSION

For these reasons, the petitioner respectfully prays that this Court grant its writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by U.S. Mail to MARK V. JACKOWSKI, ESQUIRE, ASSISTANT UNITED STATES ATTORNEY, 500 Zack Street, Rm. 410, Tampa, FL 33602 and Solicitor General, Dept. of Justice, Washington, D.C. 20530, this 3rd day of July, 1989.

WEINER, ROBBINS, TUNKEY & ROSS, P.A.

By: Benjamin S. Waxman

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3202

D.C. Docket No. 87-170

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERICK JOSEPH TURK,

Defendant-Appellant,

Appeal from the United States Court for the Middle District of Florida

---

(March 31, 1989)

Before JOHNSON and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir.R. 36-1.

Judgment Entered: March 31, 1989
For the Court: Miguel J. Cortez, Clerk

By: /S/ Karleen McNabb
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-3202

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERICK JOSEPH TURK,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 31, 1989, 11 Cir., 198___, ____ F.2d ___). (May 4, 1989)

Before JOHNSON and EDMONDSON, Circuit Judges, TUTTLE, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT

/S/ FRANK M. JOHNSON, JR.
United States Circuit Judge

is within that, July of 88.

THE COURT: All right. I am going to instruct the Government in its opening statement not to mention the fact that these two were incarcerated, if they were, or that the evidence--they intend to produce that. They are not bound by their opening statement if they don't mention it. They can do it if it becomes relevant. The Government has ample opportunity to show, according to your testimony, your evidence, that they did meet in Miami in 1960--what?

MR. JACKOWSKI: '83.

THE COURT: '83. And there is nothing to suggest that the Government to keep saying they had known each other before. It is not details about where and when and that gets it under way. There is no prohibition about what you can say, but I will rule on questions of evidence thereafter as they become relevant.

And this prohibition against mentioning about being in the correctional

institution is not a fixed ruling that applies throughout the case. I will rely upon the Rules of Evidence and I will rule on them any time they are made at that time.

But I just suggest that at the outset, no evidence having been received, there is nothing before me I can rule upon to see whether it is relevant, it is called, as you know, the Beachum Tests (sic), which is applicable in on either one, in my judgement (sic). I applied about equally in 609 or 404-B cases.

I talks about extrensic (sic) evidence, acts, and so forth, and I will rule on that when it comes. Do you understand Mr. --

MR. JACKOWSKI: I do, Your Honor.

THE COURT: Is there anything else now that needs to be -- Mr. Ross, in your opening statement you can talk about entrapment if you want to. Just don't start telling them what the Government can and can't do. I will tell them about that. You

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can explain what entrapment is if you want to. It is up to you.

MR. ROSS: Thank you, Your Honor.

THE COURT: All right. Are we ready to proceed?

MR. JACKOWSKI: Yes, sir.

MR. ROSS: Yes, sir.

THE COURT: See if the jurors are present. If they are--let the record show it is 1:30. The first thing we will do is swear the jury.

(The jury returned to the courtroom.)

THE COURT: Good afternoon, ladies and gentlemen. Thank you, and be seated.

THE CLERK: Members of the jury, please raise your right hand.

(The jury was duly impanelled and sworn.)

THE COURT: Thank you and be seated.

opportunity right now.

MR. ROSS: I move for a mistrial based upon a--within twenty minutes of Government beginning its case, violations of the Court order that this jury wasn't to hear until the Court made an evidentiary ruling about Mr. Turk's incarceration, and it began right away with this witness at that starting off--first of all, that's why I objected to him saying about anything about Eglan (sic), and the Court permitted that, and then the witness said, referring to "I have known Turk since 1977." Your Honor, he already testified he was in Eglan (sic)--

THE COURT: Well, counsel, I was listening. It is all very well and I can instruct the Government attorney about how to, what to say and not to say and he complied with it. He hasn't violated that rule at all. The witness obviously was instructed not to talk about the fact, if it was a fact, that he met Mr. Turk at Eglan (sic), but he hasn't said that.

MR. ROSS: Your Honor is wrong. Your Honor missed it. I don't think you heard it. That's why I am saying it. If I can continue--

THE COURT: No. I am not going to let you continue. I am going to let the reporter read it to me.

MR. ROSS: If I just may point to it, he said, "We talked about old things, all kinds of things, old buddies from Eglan (sic) Air Force Base."

THE COURT: We will see about that. I heard "old buddies" but I didn't hear anybody--is the reporter still down there? Would you see if she can find--sir, are you a spectator? Who are you sir?

A VOICE FROM THE AUDIENCE: I am an (sic) spectator.

THE COURT: Who is he, Mr. Ross?

MR. ROSS: He is a friend of mine, an attorney in Miami.

THE COURT: You are here--

A VOICE FROM THE AUDIENCE: I am

here as a spectator only.

THE COURT: You have a right to be here as a spectator.

All right. Thank you.

MR. ROSS: Shall I point out the place?

THE COURT: Let her read it to me.

(The above requested question was read by the court reporter.)

THE COURT: What he said was: "We talked about a couple of old buddies from Agland (sic)." I remember that. And I remember--I was listening for it. But he didn't say "while you were at Eglan (sic)" or "while Turk was at Eglan (sic)" or anything about so and so at Eglan (sic).

You could assume from this if you wanted to, if you weren't looking from something else, that buddies were buddies from Fong's from Eglan (sic), but Fong has developed that he was at Eglan (sic). Nobody has said yet that Mr. Turk was at Eglan (sic).

I deny the motion for mistrial. I don't see any problem about it, and as a matter of fact, as we get further along with the trial I have an idea, I have an idea now, because it is a constant weighing, balancing project, that I may--may admit evidence to the effect that Mr. Turk was at Eglan (sic) himself but he hadn't done that yet. I haven't ruled on that yet and there hasn't been anything about it.

Now, there is another time that you--

MR. ROSS: Yes, sir. The first time was when the witness said: "I have known Turk since approximately 1977 when we--"and then he stopped apparently obeying the admonission (sic) that Mr. Jackowski had told him about earlier.

THE COURT: I think that is a fair summary of the evidence.

MR. ROSS: That was the earlier one. The second motion was the one that we just addressed. The third objection of motion was

Turk said "An old buddy," and this is in the context of these old buddies from Eglan (sic) that the Court is concluding are not buddies of Turk's (sic).

THE COURT: He didn't say whose buddies they were.

MR. ROSS: I appreciate that, Your Honor, but with all respect to this Court, I think the interpretation placed upon it by the Court is far-fetched and this jury knows now that Mr. Turk was incarcerated at Eglan (sic) Air Force Base with this man--he has already sa , "I have know (sic) him since 1977." He already testified he spent all of '77 in jail.

THE COURT: You are arguing now and I have ruled already. Now you are three motions from mistrial.

MR. ROSS: The third one was that Turk was saying old buddies came to see him. That is the nature of 404-B evidence which is tenuous which can't be cross-examined so I moved on that basis as well.

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THE COURT: What is that now?

MR. ROSS: It is in the nature of 404-B if he starts talking about Turk--what he said was Turk had done business with some old buddies from Eglan (sic) that he, Fong, wanted to do the same type of business.

THE COURT: That's right. That is what happens when you call a witness and try to tell him to doctor his testimony to fit some rule, and he the witness himself--I don't find the witness intentionally violated any rule. I don't find the Government attorney violated any rule, and I don't find there are any bases for any mistrial.

Now, as I say, sooner or later--I want to say this. I don't want to have the record stop right now. I am aware of the Beachum Case (sic), the tests set up there, and I am aware of Rule 404-B of the Federal Rules of Evidence and I am also aware, if we ever get to it, and we haven't yet, the Federal Rules of Evidence 609. And I am aware that in the case of Braithwaite, which

interpretes (sic) and deals with the Beachum (sic) Case.

Braithwaite was a case I have tried in the Eleventh Circuit, 1983, 709 Fed 2d 1450, that that case pointed out that the trial judge was making an on the record finding that the probative value of admitting a prior conviction outweighs his prejudicial effect.

We haven't talked about a conviction, but I apply this same rule towards acts and 404-B evidence to make it. So if I ever get around to that I will make an on the record finding. I haven't done that yet. In my judgement (sic) the jury hasn't heard anything about anything.

You can assume anything. You can imagine anything. circumstantial evidence can be done. But the Government is not going to be allowed to admit, to argue, for instance. You heard him say he knew him from 1977. You heard testimony that in 1977 Fong was at Eglan (sic). You heard him testify,

Fong, that he and Turk talked about old buddies from Eglan (sic).

Therefore, I urge you to find--you can conclude from that that, Mr. Turk himself was at Eglan (sic). He can argue that, He is not going to argue that based on the record at the moment. He would violate the rules if he did.

All right. Anything else?

MR. ROSS: A motion on a different ground, similar but different.

Your Honor, we were twenty minutes into the Government's case, and I would ask for a mistrial based on this.

Your Honor, I came in here to try the case believing, although Mr. Jackowski did not know I was going to go on entrapment defense, that this prior incarceration would not be the subject of the jury knowing it. And while I appreciate Your Honor has made the findings that you made--

THE COURT: You brought with you a prepared motion.

MR. ROSS: That was for the record. Frankly, Mr. Jackowski told me on Friday last when we spoke that he wasn't going admit that into evidence, that he agreed with my assessment, and he is entitled to change his opinion.

THE COURT: I don't think he intentionally does.

MR. ROSS: I am not suggesting for a moment that he has nor even that Mr. Fong has. Your Honor, with only twenty minutes into the case--

THE COURT: You are talking about twenty minutes, it seems like hours that we keep talking.

MR. ROSS: I appreciate that. Your Honor, I ask for an opportunity to try this case anew, a mistrial, because if the Court is suggesting--I am hearing this type of ruling, that is why I moved in limine, the Court has permitted me to go in front of this jury and argue my entrapment case. I don't know if I am going to get an entrapment

instruction at the end of the case.

THE COURT: You probably will. I think it would be error if you didn't.

MR. ROSS: I appreciate that.

THE COURT: I'm not saying how much it is going to be, but--

MR. ROSS: I am concerned that now I am saddled with this situation: that if I don't proceed on an entrapment case there is not a chance in the world this court would even allow this guy to talk about old from Eglan (sic). I fear that Your Honor is giving some leeway here because I have raised entrapment. And if that is the case I want to withdraw the entrapment defense and--

THE COURT: Not at all. I have suggested, which is clear, that if you raise entrapment you open the door to predisposition. You open the door to the rule of law that says that the Government then, in order to attempt to show predisposition, he is freed of some of the restrictions of the Rules of Evidence about

prior convictions, and so forth. An I don't have my, quote, entrapment file with me, as I said, but I will get it, it is upstairs. I am sure what the law is. That is all.

I have tried cases with entrapment defenses lots of times, and I think I am familiar with the law and I haven't misled you at all. I haven't saddled you with anything and I haven't even held the horse while you saddled yourself.

MR. ROSS: The circumstances, though, have resulted in my client trying to get a fai trial where--the Court says the know directly that he was in jail. Your Honor, it is more damaging almost that it's been implied through inuendo and a juror would think--

THE COURT: You made a motion for mistrial and I denied it. Are you making another one?

MR. ROSS: Yes.

THE COURT: I am denying that. To some extent the trial of a case with good

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lawyers, and you are a good lawyer, you have tried more cases before me than Mr. Jackowski. But there is an air bit of flow and that is the reason you are here. If everything were all set before the trial ever starts you wouldn't need to be here. You could send a paralegal down to try the case. You could. But you can't because that it not the way it is. You are doing a very good job. Nobody is takibng (sic) advantage of you.

MR. ROSS: As a matter of just assessing it, if I knew this man was going to be allowed to say what he did, I would have incorporated that fact that my client was in jail somehow in my defense or abandoned the defense altogether. That is the gist for the the (sic) motion for mistrial and I am strapped with that now.

THE COURT: All right. I told you that when you mentioned on it the voir dire. All right. You hadn't made

MR. ROSS: I would also like to point out to the Court where within the same literally the same paragraph so the record will later speak, if I am accurate as to how close in time they were, the man says that Fong and Turk were in prison together and then he said the purpose of going down there was to see if Turk was still involved in cocaine trafficking.

There's only one inference that can be drawn by the jury. The inference is that Turk was in jail for cocaine trafficking. It is not so. It is an inaccurate inference, and there is nothing I can do without exacerbating the problem and I ask for a mistrial based upon that.

THE COURT: I deny the motion for mistrial, and you will have to make you own judgment on what you do. If you set about trying to prove that, in my judgment you will just be taking on a burden that you don't have and don't need to do.

MR. ROSS: All right, sir. What, if

anything, is the Court's intention to do with regard to the problem of this jury having three times now heard about Mr. Turk?

THE COURT: I have done all I am going to do.

MR. ROSS: I would ask the Court --

THE COURT: Let me just say this. You asked me something. In my judgment, there is no -- you had made an objection for another reason before you made that statement, so I granted it and I sustained and I told the jury to disregard the statement and I struck it. But I didn't go into any detail as to why, and I have done all I am going to do about that.

If you supply me with some kind of instruction that you want me to give, I will consider it later on during the trial. But I don't know of any that you can do which would not aggravate it.

I will tell the jury, as I do standardwise (sic), that the defendant is not on trial for any act or conduct not charged

in the indictment, that he has the presumption of innocence and all that sort of thing.

MR. ROSS: Okay. I am glad Your Honor said that; you don't perceive any instruction that wouldn't exacerbate the problem, because nor do I --

THE COURT: No. Well, why did you ask me if I was going to give one?

MR. JACKOWSKI (sic): Well, I don't want later, the appellate court, Your Honor is quite a veteran District Judge, and I don't want the appellate court later to say, well, look, Ross didn't ask for a curative instruction as a prerequisite for getting a mistrial. There is no curative instruction I can ask for.

Now, all of this is done. Your Honor has ruled --

THE COURT: Well, sure there is. I have done what I could. I struck the testimony and to told the jury to disregard it. That is curative.

MR. ROSS: Your Honor, now, I would ask the Court to make inquiry as to how, when we were operating under the obvious direction of the Court --

THE COURT: Inquiry of whom?

MR. ROSS: Inquiry of the Government as to how this witness could possibly have testified to that. Your Honor instructed him to tell his witnesses not to mention that --

THE COURT: I am not going to -- I think he knows and he wished the witness hadn't said it. But this is the circumstance.

I am not going to tell him how to try his case. The Government I told earlier to discuss with all these Government witnesses the situation.

MR. JACKOWSKI: Yes, Your Honor.

THE COURT: All right. Let's go.

MR. JACKOWSKI: Does Your Honor still want to take that ten-minute recess?

THE COURT: No, we don't need it now.

MR. JACKOWSKI: All right.

(Thereupon, the side-Bar conference was concluded.)

THE COURT: You made (sic) proceed.

MR. JACKOWSKI: Yes, Your Honor.

Q. Directing your attention, sir, to May 11th of 1987, are you aware of whether or not Mr. Fong made any attempts to